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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAW OFFICES OF ROGER E. NAGHASH,

Plaintiff and Appellant,

v.

CHRISTOPHER J. DAY,

Defendant and Respondent.

G040925

(Super. Ct. No. 30-2008-00102778)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Law Offices of Roger E. Naghash and Roger E. Naghash for Plaintiff and Appellant.

O'Connor & Schmeltzer, Lee P. O'Connor and Timothy J. O'Connor for Defendant and Respondent.

The Law Offices of Roger E. Naghash (Naghash) appeals from the trial court's dismissal of its action against attorney Christopher J. Day (Day), after the court sustained his demurrer without leave to amend. Naghash argues the court erred in concluding the claims against Day were barred by the litigation privilege. (Civ. Code, § 47, subd. (b).)[1] We conclude the arguments raised on appeal lack merit. We affirm the judgment.

FACTS

The events underlying this case date back to August 2003 when Robert and Amanda Hancock sued E-Z Lube for approximately $6,000 after it failed to properly install an oil filter. The Hancocks hired Naghash to try the case in superior court. Prior to trial, Naghash substituted out of the case. Represented by a different attorney, the Hancocks lost their case (hereafter referred to as the E-Z Lube lawsuit).

In October 2006, Naghash filed an action against the Hancocks to recover approximately $10,000 in unpaid attorney fees and $3,500 for costs incurred in the E-Z Lube lawsuit. The Hancocks tendered their defense to their insurance company, who retained Lee P. O'Connor to represent the Hancocks.

O'Connor retained Day as an expert witness. The complaint alleges that Day suggested O'Connor subpoena a file from the Orange County Bar Association (OCBA) concerning a mandatory fee dispute arbitration involving Naghash but different clients (Daniel Lennert and Laura Stearman). Day served as one of the arbitrators in that fee dispute. In July 2005, Day resolved the fee dispute in favor of the clients (hereafter referred to as the Lennert Arbitration case). O'Connor subpoenaed the OCBA file and then Naghash voluntarily dismissed (without prejudice) his lawsuit against the Hancocks.

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[1] All further statutory references are to the Civil Code, unless otherwise indicated.

On February 15, 2008, Naghash refiled his lawsuit against the Hancocks. Naghash also added four new causes of actions, and added Day as a defendant. It asserted Day and the Hancocks: (1) breached their fiduciary duty and confidence; (2) invaded a right of privacy; (3) improperly disclosed private facts; and (4) negligently/intentionally interfered with a contractual relationship.

On April 17, 2008, Day demurred to the complaint asserting the four causes of action were barred by the litigation privilege, section 47. Naghash opposed the motion arguing the demurrer was untimely and contained improper and irrelevant facts. Naghash also argued Day's conduct violated the Judicial Council's Ethics Standards for Neutral Arbitrators, and therefore, the misconduct was not protected by the litigation privilege. Day filed a reply, refuting these claims. After considering oral argument, the court took the matter under submission. In its minute order, the court stated, "The [c]ourt sees no way [Naghash] can amend the [c]omplaint to correct the deficiencies against Day. All statements made by Day were protected under the litigation privilege . . . . The Ethics Standards to which [Naghash] refers are not law which can be addressed by this [c]ourt. [¶] Day's [d]emurrer to the 3rd, 4th and 5th causes of action is sustained without leave to amend."[2]

DISCUSSION

(a) The demurrer was timely filed.

In its opposition to the demurrer, and on appeal, Naghash contends the demurrer was untimely filed. Naghash asserts Day violated California Rules of Court, rule 3.1320 (hereafter rule 3.1320), by scheduling a hearing more than 35 days after filing the papers. Naghash failed to prove this claim below or on appeal. The rule, in pertinent

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[2] Naghash mislabeled two causes of action as the "fourth" cause of action. There were a total of four causes of action raised against Day, and he demurred to all four. Naghash does not dispute that the court's ruling sustained the demurrer as to all claims made against Day.

part, states, "Date of hearing [¶] Demurrers must be set for hearing not more than 35 days following the filing of the demurrer *or on the first date available to the court thereafter*. For good cause shown, the court may order the hearing held on an earlier or later day on notice prescribed by the court." (Rule 3.1320 (d), italics added.)

Here, the demurrer was filed and served on April 16, 2008, and the hearing was scheduled for 70 days later, on June 25, 2008. Day asserted in his briefs below, and on appeal, June 25 was the first date available for the court and was provided by the court clerk. On appeal, Naghash asserted Department C22 is a self-calendaring department and law and motion matters are heard on each Wednesday. He argued Day scheduled his own hearing for a Wednesday beyond the statutory time to have a demurrer heard. However, this contention was not raised in writing or orally before the trial court. Naghash provided no evidence a Wednesday within the 35-day time frame was available but ignored by Day. For that matter, neither party provided supporting evidence or authority for their assertions about how matters are calendared in Department C22. We must presume the court was aware of the argument, it knew how the matter came to be calendared in its court, and it would have been aware of any backlog in May and June 2008. Because we have no evidence suggesting otherwise, we conclude the trial court properly considered and rejected Naghash's untimeliness argument by sustaining the demurrer without leave to amend.

(b) The demurrer's formatting was not defective.

Naghash concludes the demurrer violated rule 3.1320(a) and (e). We disagree.

Rule 3.1320(a) provides: "Grounds separately stated [¶] Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."

Rule 3.1320(e) provides: "Caption [¶] A demurrer must state, on the first page immediately below the number of the case, the name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer."

We have carefully reviewed the demurrer. The second page of the demurrer specified in separate paragraphs the grounds for Day's demurrer to four different causes of action. Each paragraph contained the title and name of the causes of action being attacked from Naghash's complaint. Day also carefully noted two causes of action were mislabeled as both being the fourth cause of action. Day renumbered them properly in order. Certainly, there was no violation of rule 3.1320(a). Similarly, the caption contained all the necessary information, stating in capital letters under the case number: "Demurrer of Defendant, Christopher J. Day to complaint of Plaintiff, Law Offices of Roger E. Naghash; Memorandum of Points and Authorities." The notice confirmed Day was demurring individually and not jointly with the other defendants. There was no violation of rule 3.1320(e).

Naghash also argues the demurrer was fatally defective because it contained additional facts and background information not contained in the complaint. This argument does not win the day. Regardless of whether Day provided information beyond what was alleged in the complaint, Naghash has forgotten our review of the trial court's ruling on whether the complaint was defective is de novo. (See *Lazar v. Hertz Corp*. (1999) 69 Cal.App.4th 1494, 1501 (*Lazar*).) Moreover, we review the court's denial of leave to amend for abuse of discretion. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) As explained in more detail in the next section of our opinion, Naghash does not contend the trial court improperly considered facts or information not in the complaint when making its ruling. Consequently, the argument the demurrer's formatting was defective is irrelevant.

(c) The demurrer was properly sustained without leave to amend.

We review the order sustaining Day's demurrer de novo, exercising our independent judgment as to whether as a matter of law the complaint states a cause of action on any available legal theory. (*Lazar, supra,* 69 Cal.App.4th at p. 1501.) We assume the truth of all material factual allegations together with those matters subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "If the court sustained the demurrer without leave to amend, . . . we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment." (*Schifando, supra,* 31 Cal.4th at p. 1081.) And finally, if we conclude an amendment could cure the defect, then the trial court abused its discretion and we will reverse. (*Ibid*.) Naghash "has the burden of proving that an amendment would cure the defect." (*Ibid*.)

Naghash's opening brief provides pages and pages of boilerplate law regarding demurrers. It repeatedly asserts, "[T]he operative complaint states sufficient facts to state causes of action. All elements of the causes of action are pled with sufficient certainty." And despite providing pages of case law discussing the guidelines for granting a party leave to amend, Naghash does not specify anywhere what additional facts it should have been permitted to include in an amended complaint to cure a defect. Instead, Naghash focuses only on the necessary legal elements of each cause of action alleged, and he provides record references purportedly showing there are facts to support each one. It concludes, "In this case, no defect appears on the face of the operative complaint and there is NO absolute immunity that bars any cause of action against [Day]. If any, the alleged immunity is a 'qualified immunity' that is highly fact sensitive and its adjudication solely rests with the trier of fact."

In short, Naghash's sole argument is the litigation privilege cannot be decided as a matter of law but must be decided by a trier of fact. It does not contend the complaint could or should be amended to refute the litigation privilege. Naghash has narrowed the issue to a legal one, which we review de novo. "'If there is no dispute as to

the operative facts, the applicability of the litigation privilege is a question of law. [Citation.] Any doubt about whether the privilege applies is resolved in favor of applying it. [Citation.]' [Citation.]" (*American Products Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP* (2005) 134 Cal.App.4th 1332, 1343.) As we will explain, there is no dispute as to the operative facts, and there is no doubt the litigation privilege applies.

Section 47, subdivision (b), "renders absolutely privileged communications made as part of a 'judicial or quasi-judicial proceeding[.]' [Citations.] 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' [Citation.]" (*People Ex Rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957-958 (*Pacific Lumber Co.*).)

"'"The principal purpose of [the litigation privilege] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]"' [Citation.] . . . [¶] To achieve this end, the absolute privilege is interpreted broadly to apply 'to *any* communication, not just a publication, having "some relation" to a judicial [or quasi-judicial] proceeding,' irrespective of the communication's maliciousness or untruthfulness. [Citations.] And 'judicial or quasi-judicial' proceedings are defined broadly to include 'all kinds of truth-seeking proceedings,' including administrative, legislative and other official proceedings. [Citation.] Further, the privilege '"is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." [Citation.]' [Citation.]" (*Pacific Lumber Co., supra,* 158 Cal.App.4th at pp. 958-959.)

Naghash asserted four causes of action against Day, alleging breach of fiduciary duty, breach of confidence, invasion of a right of privacy, public disclosure of private facts, and interference with a contractual relationship. These claims are all

premised on the allegation Day disclosed to a third party privileged and private information he obtained as an arbitrator, without first obtaining the consent of the arbitrating litigants. Specifically, Naghash's complaint asserted O'Connor conspired with Day to reveal the confidential information "as a pretext of testifying . . . as an expert witness[.]" It alleged Day disclosed the information "for the sole purpose of gaining personal profit." Naghash asserted the communication was in violation of Day's duty and promise to avoid conflicts of interest and the disclosure breached his obligation to not reveal "anything to the detriment of [Naghash], and to refrain from profiting, benefiting, or gaining an advantage at the expense and/or to the detriment of [Naghash.]" Naghash asserted the arbitration "had absolutely NO relevance" to the Hancock's case, but after O'Connor requested the records, it was forced to take action to preserve the attorney client privilege with the law office's former clients and their right of privacy. It did not seek a protective order in the trial court but rather dismissed the action purportedly to "prevent further disclosure of private, privileged, and confidential information."

Day's alleged communication of information about the prior fee dispute arbitration, whether malicious or unethical, falls squarely within the scope of the litigation privilege: The communication was made in preparation of litigation, by a participant connected with the litigation, and the communication was intended to assist in achieving the objects of the litigation. (See *Pacific Lumber Co.*, *supra*, 158 Cal.App.4th at p. 958 [elements of litigation privilege].)

In its brief, Naghash suggests Day was not yet retained as an expert witness when he made the communications, and therefore, he was not the type of person entitled to claim the privilege. Specifically, on appeal Naghash speculated Day "disclosed the private and privileged information to bolster his own credential *to be retained* as an expert witness for [the Hancocks]." (Italics added.)

However, it makes no difference whether Day disclosed the information at issue before or after being formally retained as a witness. The statutory language is

broadly worded to include communications related to litigation, and case authority has extended the privilege to statements made by potential expert witnesses like Day. As noted by one court, "Who made the statement is merely a circumstance to consider in ascertaining its relationship to litigation. [Citation.]" (*ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 316-317 [privilege protected defendant's former employee who as consultant, not a witness, provided plaintiff with information based on his former employment]; citing *Bernstein v. Alameda etc. Med. Assn*. (1956) 139 Cal.App.2d 241, 245-247 [medical society could not expel doctor for report on another doctor's performance provided to attorney for use in worker's compensation proceeding]; *Block v. Sacramento Clinical Labs, Inc*. (1982) 131 Cal.App.3d 386, 392-394 [no professional negligence claim arises from toxicologist's report to district attorney on blood sample studies or later testimony at hearing on resulting criminal charges]; *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 913-916 [accountant's written and oral valuations of business for purpose of dissolution no basis for husband's claims of negligent and intentional infliction of emotional distress or abuse of process].) Naghash's complaint alleges Day's statements were made to secure employment as an expert witness and to assist a litigant seeking evidence. Nothing about this relationship to the litigation disqualifies Day from claiming the privilege.

Likewise, we find meritless Naghash's argument the court erred in concluding Day's disclosure was intended to assist in achieving the objects of the litigation. (See *Pacific Lumber Co., supra,* 158 Cal.App.4th at p. 958 [discussing necessary elements of litigation privilege].) The complaint alleged Day's communication related to an arbitrated attorney fee dispute involving Naghash. Since the Hancocks have also found themselves in an attorney fee dispute with Naghash, the information was relevant especially in light of the fact Naghash's previous clients prevailed in the arbitration. Naghash's complaint also alleged Day's communication prompted O'Connor to prepare and issue a subpoeana to the OCBA to obtain further information about the

arbitrated fee dispute. It can be inferred O'Connor concluded more information about the attorney fee arbitration would be helpful to the Hancocks' case. Naghash does not suggest O'Connor's subpoena was prepared simply to harass Naghash or its former clients. In the complaint, Naghash asserted Day's communication breached his obligation to avoid revealing "anything to the detriment of [Naghash.]" This would obviously include an unfavorable result in a similar kind of fee dispute. We recognize the complaint contained the legal conclusion the disclosed "information had absolutely NO relevance" to the Hancocks' attorney fee dispute. However, a legal conclusion is not an ultimate fact and will not be deemed admitted by the demurrer, especially when the allegation is contradicted by other more specific factual allegations in the complaint.

Alternatively, Naghash argues the litigation privilege does not apply to any unlawful or tortious activity. Naghash asserts it was unlawful *activity* for Day to accept employment as an expert witness without Naghash's prior consent. To support its argument, Naghash cites to several cases holding the litigation privilege applies only when a defendant's conduct is communicative rather than noncommunicative. (*Kimmel v. Goland* (1990) 51 Cal.3d 202 (*Kimmel*) [secret tape recording of telephone conversations in violation of Penal Code section 632, California's Invasion of Privacy Act, was not protected]; *Ribas v. Clark* (1985) 38 Cal.3d 355 [eavesdropped on a telephone conversation violating Penal Code section 630 was not protected]; *Mansell v. Otto* (2003) 108 Cal.App.4th 265 [illegal reading of mental health records not a protected activity].)

"Because the litigation privilege protects only publications and communications, a 'threshold issue in determining the applicability' of the privilege is whether the defendant's conduct was communicative or noncommunicative. [Citation.] The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. [Citations.] That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its

essential nature. [Citations.] The following acts have been deemed communicative and thus protected by the litigation privilege: attorney prelitigation solicitations of potential clients and subsequent filing of pleadings in the litigation [citation], and testimonial use of the contents of illegally overheard conversation [citation]. The following acts have been deemed noncommunicative and thus unprivileged: prelitigation illegal recording of confidential telephone conversations [citation]; eavesdropping on a telephone conversation [citation]; and physician's negligent examination of patient causing physical injury [citation]." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058 (*Rusheen*).)

We find meritless Naghash's argument Day's agreement to act as an expert was an illegal *action* eliminating the litigation privilege in this case. We find the gravamen of Naghash's complaint rests with Day's *disclosure* of confidential information about the Lennert Arbitration case, not with his employment as an expert witness for the Hancocks. "[T]he injury allegedly resulted from an act that was communicative in its essential nature." (*Rusheen, supra,* 37 Cal.4th at p. 1058.)

To the extent the complaint could be amended to reflect a challenge to the "action" of entering the employment relationship, it would not save the case. The litigation privilege does not apply to *unlawful* activity. Day's agreement to serve as an expert witness was not illegal. Regardless of whether the employment relationship may have violated the Judicial Council's Ethics Standards for Neutral Arbitrators, it cannot be said his employment amounted to an illegal or criminal act.[3]

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[3] In the reply brief, Naghash for the first time argues the complaint alleges tortious activity: It stated Day ruled against Naghash in the arbitration to make Naghash a "permanent enemy." Naghash reasoned "the release of privileged and private information without consent was in furtherance of a revenge . . . ." It concluded Day's release of private information was motivated by "vengeance, and desires to retaliate" and therefore qualified as tortious activity. It misunderstands the litigation privilege. Regardless of the motivation behind it, the release of information was clearly communicative in nature. "Although the litigation privilege was originally limited to shielding litigants, attorneys and witnesses from liability for defamation [citation], it has been interpreted to apply to virtually all torts except malicious prosecution. [Citations.]

Having once served as a neutral arbitrator, Day certainly was required to comply with Judicial Council's Ethics Standards for Neutral Arbitrators, Standard 12(d) (forbidding arbitrators from accepting employment in certain kinds of matters without the informed written consent of all parties). (Cal. Rules of Prof. Conduct, rule 1-710 [State Bar members serving as arbitrators are subject to Ethics Standards].) If Day's employment agreement violated the Ethics Standards, he may be subject to discipline by the State Bar. But as correctly noted by the trial court in this case, violation of an Ethics *Standard* is not the same thing as violation of a *law*.

Naghash provided no legal authority, and we found none, holding a violation of an Ethics Standard in the Judicial Council's Ethics Standards for Neutral Arbitrators may be the basis for a civil or criminal claim. Nor did Naghash provide any reasoned analysis or legal authority to support its contention an arbitrator would owe an ongoing fiduciary duty to litigants and can be sued for violating Ethics Standards. A trial court's ruling is presumed to be correct and the burden of demonstrating error rests squarely on the appellant. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632, and cases cited therein.) When an appellant raises an issue "but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Even when our standard of review is de novo, the scope of review is limited to the issues that have been adequately raised and are supported by analysis. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Naghash's failure to demonstrate any trial court error in concluding Day had not committed an illegal act as a matter of law compels affirmance of the judgment.

. . . [Citations.]" (*Kimmel, supra,* 51 Cal.3d at p. 209.)

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.